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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 986

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUBJECT INDEX.

PAGE

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Petitioner for Certiorari Presents Solely a Question of Fact 4

II. The Issue Was Correctly Decided Below 4

A. Respondent is entitled to all reasonable inferences which may be drawn from the evidence and all conflicting testimony must be construed most favorably to him 4

B. Under the law of Illinois a transaction in grain futures is illegal where the parties intend not to settle by actual delivery 5

C. The distinction between the so-called joint account the so-called personal account 9

D. The court properly refused to direct a verdict in favor of plaintiff on the issue of the legality of his trades 10

III. Petitioner's Cases Distinguished 17

CONCLUSION 18

Authorities Cited.

Cases.

American National Bank & Trust Co. v. United States (C. C. A. 7, 1939) 104 F. 2d 783..... 5
Bartlett v. Slusher (1905) 215 Ill. 348..... 6
Board of Trade v. Christie G. & S. Co. (1905) 198 U. S. 246 17
Campbell v. McConnel (1919) 214 Ill. App. 342..... 6, 7
Dickson v. Uhlmann Grain Co. (1933) 288 U. S. 188..12, 17
Easton Farmers Grain Co. v. Fernandes Grain Co. (1923) 229 Ill. App. 102..... 6
Ehrlich v. Rothschild (1937) 292 Ill. App. 511..... 14
First National Bank v. Miller, et al. (1908) 235 Ill. 135 6
Jamieson, et al. v. Wallace (1897) 167 Ill. 388..... 8
Lamson, et al. v. West (1916) 201 Ill. App. 251..... 6, 7
Miller v. Sincere (1916) 273 Ill. 194..... 6
Nash-Wright Co. v. Wright (1910) 156 Ill. App. 243.. 6
Noble v. United States (C. C. A. 8, 1938) 98 F. 2d 441. 5
Ohlendorf v. Bennett, et al. (1926) 241 Ill. App. 537... 6
Pardridge v. Cutler (1897) 168 Ill. 504..... 6
Pratt & Co. v. Ashmore (1907) 224 Ill. 587..... 6, 8
Riordan v. McCabe (1930) 341 Ill. 506.....6, 7, 8
Salzman v. Boeing (1940) 304 Ill. App. 405.....6, 7, 14
Southern Fruit Distributors v. Fulmer (C. C. A. 4, 1939) 104 F. 2d 456..... 5
State v. Christopher (1927) 318 Mo. 225..... 12
Towne v. Buckley (1923) 230 Ill. App. 573..... 6
Weare Commission Co. v. The People (1904) 209 Ill. 528 ..... 6, 8
White v. Turner-Hudnet Co. (1926) 322 Ill. 133..... 6
Wilson v. United States (1896) 162 U. S. 613..... 16

Statutes Cited.

Section 130 Illinois Criminal Code (Ill. Rev. Stat. 1939, Chap. 38, Sec. 328) 1, 5, 14

Miscellaneous.

Wigmore on Evidence (Vol. 2, 3rd ed. 1940, Sec. 278) .. 16

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The only question presented by the petition for certiorari is whether the record contains sufficient evidence of the illegality of particular trades of petitioner in the grain futures market to have warranted the trial court in submitting that question to a jury. An Illinois statute,* which has frequently been construed by the Illinois courts, makes transactions in grain futures illegal where the parties intend to settle on differences. Intention is, of course, a question of fact.

No federal question is involved. No important question of local law is involved because each case involving the intentions of the parties to any particular grain trade must obviously depend on its own facts.

* Section 130 Criminal Code, Sec. 328, Chap. 38 Ill. Rev. Stat. (1939).

Petitioner sustained a loss of approximately $3,000 in the corn market. He brought suit under the Sherman Anti-Trust Act to recover from the respondent approximately $50,000, including three times his loss, three times his anticipated profit, three-fold interest upon both those items, and attorney's fees.

Two issues were presented to the District Court: (1) did respondent violate the Sherman Anti-Trust Act? and (2) did petitioner violate section 130 of the Illinois Criminal Code. The District Court directed a verdict in favor of petitioner (plaintiff below) and against the respondent (defendant below) on the first issue, and submitted to the jury the second issue. The jury returned a verdict for respondent. The District Court entered judgment on the verdict and the Circuit Court of Appeals affirmed.

Petitioner's brief contains a number of unwarranted statements of fact, and many material omissions of relevant facts. Some of these will be dealt with by respondent in the argument.

Petitioner's recitation of facts respecting the respondent's acts in the corn market is not material to the petition for certiorari, because on that issue a verdict was directed against the respondent. Those matters do not serve any legitimate function in this brief and we shall not comment upon them.

SUMMARY OF ARGUMENT.

It is conceded by petitioner that the only question presented to this court is one of fact. The controversy concerns an Illinois statute construed on numerous occasions by the Illinois courts. Under Illinois law contracts in grain futures are illegal where the parties intend to settle on differences and not by actual delivery. A contract in corn futures settled by an offsetting trade is illegal where the parties intended at the time the contract was entered into that the contract be settled by the payment of differences and not by actual delivery of corn. The question of intention is an issue of fact in which each case must depend on its own particular facts. The evidence abundantly showed the transactions of petitioner to have been entered into with an intention to settle on differences and the District Court properly submitted that issue to the jury.

ARGUMENT.

I.

THE PETITIONER FOR CERTIORARI PRESENTS SOLELY A QUESTION OF FACT.

As petitioner says (p. 4, petn.) the question presented by the petition relates solely to an issue of fact. Such a question does not present any of the considerations tending to induce this Court to grant review as set forth in its rule 38. Furthermore, this Court has frequently held that it will not examine a question of fact on which the two lower courts have concurred. In any event the evidence abundantly shows an intention to settle on differences.

The Illinois statute involved has been frequently construed by the Illinois courts and no question concerning its meaning or applicability is or can be raised. There is no occasion for this court to grant certiorari since the District Courts and the Circuit Courts of Appeals in deciding a similar question are bound to look to the Illinois law. The petitioner recognizes that the law of this case can apply only to the particular facts in evidence since he urges that the legality of his trades under the Illinois statute is a question of fact.

II.

THE ISSUE WAS CORRECTLY DECIDED BELOW.

A. Respondent Is Entitled to All Reasonable Inferences Which May Be Drawn from the Evidence and All Conflicting Testimony Must Be Construed Most Favorably to Him.

Respondent, having received the verdict of the jury, is entitled to the benefit of all reasonable inferences that may be drawn from the testimony. If reasonable men might have reached different conclusions from the evidence

in this record, then the trial court properly submitted the case to the jury. *American National Bank & Trust Co.* v. *United States* (C. C. A. 7, 1939) 104 F. 2d, 783; *Noble* v. *United States* (C. C. A. 8, 1938) 98 F. 2d, 441; *Southern Fruit Distributors* v. *Fulmer* (C. C. A. 4, 1939) 104 F. 2d, 456.

B. Under the Law of Illinois a Transaction in Grain Futures Is Illegal Where the Parties Intend Not to Settle by Actual Delivery.

Petitioner urges that the discretionary power of this court to grant a writ of certiorari be invoked because the decision of the Circuit Court of Appeals is contrary to the Illinois law construing Section 130 of the Illinois Criminal Code. We believe it is accurate to say that the decision of the Circuit Court of Appeals is in accordance with, and that the contentions of the petitioner in this court are directly contrary to, a long line of Illinois cases construing that statute. It is interesting to note that although petitioner claims the decision below is contrary to the Illinois law, of the sixteen cases cited by him to support his construction of the Illinois statute, only four were decided by Illinois courts.

Section 130 of the Criminal Code provides in part:

> "Whoever contracts to have or give himself or another the option to sell or buy, at a future time, any grain, * * * where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, * * * shall be fined * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." (Ill. Rev. Stat. 1939, Chap. 38, Sec. 328.)

Under the Illinois statute both parties (in this case petitioner and B. C. Christopher & Co.) must have intended

that settlement be not by delivery of actual corn. But settlement by an off-setting trade is not the equivalent (within the meaning of the statute) of actual delivery. *Settlement by an off-setting trade is settlement on differences.* It has been uniformly held in every decision in Illinois that grain futures trades settled by an offsetting trade are illegal where the parties intended not to settle by actual delivery.

Petitioner seeks to derive comfort from language in certain Federal decisions—apparently losing sight of the fact that it is his contention that the decision of the Circuit Court of Appeals is contrary to the Illinois law.

In every one of the following cases the Illinois courts held illegal and void contracts for trades to be consummated on the Chicago Board of Trade which were settled by offsetting trades:

Riordan v. *McCabe* (1930) 341 Ill. 506.
Lamson, et al. v. *West* (1916) 201 Ill. App. 251.
Weare Commission Co. v. *The People* (1904) 209 Ill. 528.
Ohlendorf v. *Bennett, et al.* (1926) 241 Ill. App. 537.
Miller v. *Sincere* (1916) 273 Ill. 194.
White v. *Turner-Hudnet Co.* (1926) 322 Ill. 133.
Towne v. *Buckley* (1923) 230 Ill. App. 573.
First National Bank v. *Miller, et al.* (1908) 235 Ill. 135.
Nash-Wright Co. v. *Wright* (1910) 156 Ill. App. 243.
Campbell v. *McConnel* (1919) 214 Ill. App. 342.
Easton Farmers Grain Co. v. *Fernandes Grain Co.* (1923) 229 Ill. App. 102.
Bartlett v. *Slusher* (1905) 215 Ill. 348.
Pratt & Co. v. *Ashmore* (1907) 224 Ill. 587.
Pardridge v. *Cutler* (1897) 168 Ill. 504.
See *Salzman* v. *Boeing* (1940) 304 Ill. App. 405.

All of the petitioner's transactions were consummated on the Chicago Board of Trade by B. C. Christopher & Co. through the Chicago brokerage firm of Lamson Bros. In two of the above cases (*Campbell* v. *McConnel* and *Lamson* v. *West*) the transactions were also executed on the Chicago Board of Trade with the same brokerage firm—Lamson Bros.—and were held illegal.

Several arguments presented in the petitioner's brief are completely refuted by the Illinois law.

Petitioner contends that offsetting trades are the legal equivalent of delivery. There are only two ways to close out a futures contract on the Board of Trade: one is by delivery the other is by set-off. To argue that the latter is the legal equivalent of the former is merely to argue that all transactions on the Chicago Board of Trade are valid. This is directly contrary to the long line of cases cited above.

Petitioner contends that courts now take a more realistic attitude toward Exchanges, and he infers that the law with respect to the legality of grain future trading has changed. That argument was expressly rejected in the most recent case of the Illinois Supreme Court, *Riordan* v. *McCabe*, 341 Ill. 506, decided in October 1930, and was again rejected in the most recent case of the Illinois Appellate Court, *Salzman* v. *Boeing*, 304 Ill. App. 405, decided in April, 1940. In *Riordan* v. *McCabe*, the court said at page 512:

> "Counsel for plaintiffs in error argue earnestly that since all McCabe's purchases and sales took place on the board of trade under the board of trade rules they are legal and valid, and that to hold otherwise would be to destroy this agency of commerce."
>
> • • • • •
>
> "It seems obvious that the validity of the rules of the board of trade or its welfare are in nowise involved in this proceeding. *The act applies to transactions on the board of trade by members thereof as well as*

to other transactions involving gambling in grain futures. As has been frequently said by the courts in this country, it is quite as easy to conduct gambling transactions under the rules of the board of trade as it is legitimate transactions, and the validity of the rules of the board or its integrity as a business agency is in nowise involved. Since the matter is one entirely of intention, it is not material, under this statute, whether these transactions, so far as the board of trade or members thereof with whom the contracts for purchase or sale are made are concerned, occur under the rules of the board or quite outside of them." (Italics supplied.)

Petitioner contends that there is no evidence that the parties intended not to deliver because neither petitioner nor the partners of B. C. Christopher & Co. testified to that effect. He argues that respondent's evidence to prove the illegality of the trades was solely inferential. The Illinois courts have repeatedly held that the expressed intention of the parties is entitled to little weight and the real intention is to be gathered from all the facts and circumstances in evidence. *Riordan* v. *McCabe* (1930) 341 Ill. 506; *Jamieson, et al.* v. *Wallace* (1897) 167 Ill. 388; *Pratt & Co.* v. *Ashmore* (1907) 224 Ill. 587; and *Weare Commission Co.* v. *The People* (1904) 209 Ill. 528. In *Riordan* v. *McCabe* the court said at page 515:

> "It seems unneccessary to argue that if the intention of the parties is to be determined by their words alone then in such proceedings as here brought it would be impossible to show a violation of the law. The rule is, that it is immaterial whether the real intention is formally expressed in words if the circumstances in evidence show such intention, and a statement of intention that delivery should be made will not be allowed to prevail if the circumstances show the intention to have been that there should be no actual delivery of the commodities or acceptance thereof but merely an adjustment on differences."

If the parties intended to settle on differences and close out the trade by an offsetting without the transaction is illegal.

C. The Distinction Between the So-Called Joint Account the So-Called Personal Account.

The petitioner's brief is a studied effort to confuse and co-mingle the evidence concerning the business of B. C. Christopher & Co. carried on their books under the account headed "joint account," and the evidence concerning the personal account of petitioner. In order to understand the issue presented to the jury a distinction between those two accounts is fundamental. While petitioner testified that so far as he was concerned the accounts were alike (Rec. 75), the testimony of the Christopher partners is that the joint account was a part of the Christopher business (Rec. 139). Petitioner directed that account and received one-half of its profits as his compensation (Rec. 138). The legality of the trades in the joint account are not questioned for they are not involved in this controversy. All of the transactions referred to in the petitioner's brief concerning purchases and sales of actual corn were in the joint account. At page 24 petitioner states that answers to interrogatories disclosed that B. C. Christopher & Co. and petitioner made physical delivery of thousands of bushels of corn, and in a footnote on page 25 there are enumerated a number of companies to whom such sales were made. It is undisputed that *every one of those transactions* was in the joint account. All of those transactions were made and consummated in the name of B. C. Christopher & Co. as a part of their business (Rec. 89, 90, 138, 139).

There is no evidence in this record that the petitioner had *ever* delivered *any* actual corn on futures sales. On four occasions he testified that at no time in the spring

of 1931 (when the trades involved were made) did he own any corn in his personal account (Rec. 95, 96, 167).

Whether or not the business of B. C. Christopher & Co. and that portion of its business carried on under the joint account was valid and legal, is of no consequence in this controversy for these transactions involved in this case were not in the joint account but were wholly in petitioner's personal account. In the personal account petitioner merely took "fliers" in the market. It appears from the records of B. C. Christopher & Co., which are in evidence in this controversy, that petitioner *never* dealt in actual commodities in that account, never made or received a delivery of actual corn, and except for two isolated instances, never made or received a delivery of any commodity (Rec. 147-152, 190).

Respondent's Exhibit 2 (Rec. 173) shows that in the personal account when petitioner was short in one futures market he was long an equal amount in another futures market.

D. The Court Properly Refused to Direct a Verdict in Favor of Plaintiff on the Issue of the Legality of His Trades.

Since petitioner claims that the evidence was such that the court erred in submitting the controversy to the jury, it was encumbent upon him to recite in his brief all of the facts in evidence, and not merely those most favorable to him. Petitioner's statement of facts does not state that the records of B. C. Christopher & Co. show that *every transaction* of the plaintiff in his personal account for a period of ten years was settled on differences (Rec. 147-152); that his account was never charged with the purchase price or sale price of any commodity—that every trade in that account was settled on differences by charging or crediting the difference between the purchase price and the sale price to his account after the trade was closed

out (Rec. 136, 150); that petitioner opened the account by the deposit of margin (Rec. 144) and that the records of B. C. Christopher & Co. (all of those in existence when depositions were taken by respondent in 1938) do not show a single instance when the plaintiff ever made delivery on a short sale bushel of grain (Rec. 147, 148).

Potent evidence of the intention of the parties is found in the fact that in more than ten years the money ledger of B. C. Christopher & Co. for petitioner's personal account was never debited or credited with the purchase price or sale price of a commodity until *after the transaction was closed out* when settlement was uniformly made *on differences* (Rec. 136, 150-52).

The Christopher ledger sheets for the personal account are in evidence and it is significant that provision is made for a purchase and sale by offsetting trades on the exchange. The ledger contains no form to be used where in closing out the trade actual delivery is made (Rec. 154).

The man in charge of the futures ledgers of B. C. Christopher & Co. produced all of the ledgers for the petitioner's personal account and testified he examined each of those ledgers and could not find a single instance when petitioner ever made delivery of a commodity which he had sold in the futures market (Rec. 147).

The P & S slips are the only invoice ever sent to petitioner for his transactions in grain futures with B. C. Christopher & Co. No customer of B. C. Christopher & Co. ever received a bill for grain purchased or grain sold until the transaction was closed out, when he received a P & S slip—meaning "purchase and sale". It is an invoice showing the purchase price, the sale price and *the difference*—the latter being the amount for which the customer is charged (Rec. 136, 198). The P & S slips obviously show an intention to settle on differences.

Petitioner argued in his brief that our contention that the

P & S slips showed an intention to settle on differences and the opinion of the Circuit Court of Appeals to that effect was unwarranted because no person testified that the P & S slips show an intention to settle on differences. The P & S slips are in evidence. It seems obvious that all reasonable inferences may be drawn from those P & S slips and testimony as to what a witness thought they inferred would be improper.

Petitioner also argues that the P & S slips in evidence are in the same form as those shown in a book on future trading by Mr. J. M. Mehl of the Commodities Exchange Administration. It is, of course, immaterial whether the P & S slips in evidence are the same or different from those other brokerage houses. The validity of these transactions alone is involved. It is likewise immaterial whether the transactions conform to the requirements of the Commodities and Exchange Act. It was held by this court in *Dickson* v. *Uhlmann Grain Co.* (1933) 288 U. S. 188, that Federal Statutes with respect to grain trading did not alter in any manner the legality or illegality of such trades under state statutes.

Transactions similar to those in which the plaintiff was involved were before the Supreme Court of Missouri in *State* v. *Christopher* (1927) 318 Mo. 225 where the Supreme Court of Missouri held futures trades in a branch office of B. C. Christopher & Co. (the petitioner's brokers) were conducted in violation of the Missouri gambling statute.

Lamson Bros. (B. C. Christopher & Co.'s Chicago correspondent) kept all Christopher customers in one account and considered Christopher alone as its customer; it offset the transactions of one Christopher customer against those of another (Rec. 117). When the total short commitments of Christopher customers equaled the total long commitments of their customers, it is the undisputed evidence in this record that no customer would have any commitment

on the Chicago Board of Trade and Lamson Bros.' books would show that B. C. Christopher & Co. was even and out of the market (Rec. 118). Petitioner worked in the office of B. C. Christopher & Co. and was acquainted with the manner in which they did business. The manner in which they handled their accounts with Lamson Bros. is evidence that neither the petitioner nor his broker intended to settle by delivery.

Petitioner's Financial Ability.

Petitioner has argued in his brief that financial ability to carry the trade is important in determining the intention of the parties. He argues that he was financially able to carry the trade, but the evidence is to the contrary. In a period of ten months prior to the consummation of the trades involved in this suit, petitioner's transactions in grain futures exceeded in dollar value $1,400,000 and he traded in over 2 million bushels of grain futures (Rec. 180). His short commitment in July corn was, at the inception, 50,000 bushels at the contract price of $31,006.25 (Rec. 157). At the very same time his commitment in the wheat futures market included a short position of 50,000 bushels at a value of $29,831.25, and a long position of 50,000 bushels at a value of $31,581.25 (Rec. 156-157). His total obligations were thus over $90,000.

In sworn answers to interrogatories plaintiff states that at the time of these transactions he was worth $37,500. He testified he was worth $45,000. He included in both figures a membership on the Kansas City Board of Trade at $12,000 which he had privously assigned to his wife; his residence valued at $10,000 which was owned in joint tenancy with his wife; and a credit on the books of B. C. Christopher of $8,000 which the evidence shows during most of the time was a balance of $2,000, and for a part of the time was less than $500 (Rec. 84-85, 152). Reducing the lower estimate of the plaintiff's wealth by omitting the assets not belong-

ing to him, his financial worth was approximately $14,500. Yet he claims to be financially able to have consummated transactions of the aggregate value of $90,000. In *Ehrlich* v. *Rothschild* (1937) 292 Ill. App. 511 relied upon by petitioner, the transactions involved $13,210 and it was found that the trader was worth at least $50,000.

The Intention of Petitioner's Broker.

Petitioner maintained offices in the suite occupied by B. C. Christoper & Co. It is in evidence that he wrote out all of the orders for these transactions himself and sent them to Lamson Bros. for execution (Rec. 166). He was authorized to execute orders for Christopher & Co. and no Christopher partner even knew of petitioner's trades until long after the trades had been made (Rec. 135, 36, 86, 93, 96). Under these circumstances, the jury were certainly entitled to find that petitioner was the agent of B. C. Christopher & Co. The intention of the agent may be referred to the principal. *Salzman* v. *Boeing* (1940) 304 Ill. App. 405. B. C. Christopher, Jr., a senior partner in that firm testified that they never questioned a man who traded with them because if they did they wouldn't do any business (Rec. 140).

The Christopher employees referred to the futures ledger as the "option ledger" (Rec. 145) and the futures department as the "option department" (Rec. 193). Mr. Christopher testified that the ledgers for petitioner's personal trades were kept in the "option room" (Rec. 137). Options are expressly declared to be illegal under Section 130 of the Illinois Criminal Code. The manner in which B. C. Christopher & Co. kept their books and the manner in which they carried on their transactions with Lamson Bros, are further evidence of their intention to settle on differences.

The Petitioner's Truthfulness.

Petitioner's only evidence concerning the legality of these transactions is his own testimony with respect to his intention. Yet with respect to that intention, he gave the following conflicting versions: (1) that at the time of the sales he owned corn which he intended to deliver (Rec. 88); (2) that at the time these short contracts were made he owned corn but did not intend to deliver that corn (Rec. 85); (3) that at no time during the Spring of 1931 did he own any corn in his personal account (Rec. 95); (4) that he intended to deliver the corn in the joint account on his personal trades (Rec. 88); and (5) that the corn in the joint account had been sold by the joint account and he did not intend to deliver it on his personal trades (Rec. 95).

During a prior trial in 1938 he testified four times that at no time in the Spring of 1931 did he own any corn in his personal account (Rec. 167) and in the present trial that he did own "some" corn in 1931 in St. Joe, but it was not shown on any written record (Rec. 88-9). Petitioner testified he intended to deliver the corn in the joint account (Rec. 88) but he admitted (Rec. 94) and Mr. James Christopher testified that all the corn in the joint account had been sold in the futures market (Rec. 185). Mr. B. C. Christopher, Jr. testified he was not permitted to use the commodities of the joint account for his personal trades (Rec. 139).

Petitioner testified B. C. Christopher & Co. financed *his* trades and that *he* would pay *them* interest for the money he used and that at the end of the year *he* would give them fifty percent of the net earnings of *his* trades (Rec. 74). B. C. Christopher, Jr. testified that the expenditures of money for the joint account were not loans to anybody and that the joint account was a part of the business of B. C. Christopher & Co. (Rec. 139).

Other evidence of the petitioner's lack of truthfulness is his testimony that he gave many orders to Herwig—a partner in the Christopher firm—(Rec. 92), and Herwig's testimony that he never had transacted any business for petitioner (Rec. 193). Petitioner testified that he had no authority to give orders to Lamson Bros. for B. C. Christopher & Co. (Rec. 91), but Mr. Christopher testified to the contrary (Rec. 135). Although petitioner testified that joint account was his business, in a sworn application for membership to the Kansas City Board of Trade he stated he was employed by B. C. Christopher & Co. as a grain buyer (Rec. 162-3).

The petitioner's many different and unreconcilable versions of his intention are affirmative evidence of a conscious knowledge that the transactions were illegal. *Wilson* v. *U. S.* (1896) 162 U. S. 613. Such a conscious knowledge and an endeavor to conceal his real intention is the only reasonable explanation for that testimony. In Professor Wigmore's work on Evidence (Vol. 2, 3rd ed. 1940, sec. 278) he says:

> "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause * * * is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact of the cause's lack of truth and merit."

Hedging.

Petitioner argues that it is well-known in the grain business that those who hedge actual grain do not make physical delivery on futures sales. In support of his argument on hedging petitioner refers to certain facts contained in a book on commodities exchanges and in certain reports of the Commodities Exchange Commission. *That evidence was not presented to the trial court and is not in the record.*

There is no evidence in this record as to the percentage of transactions on the Chicago Board of Trade settled by delivery. There are two reasons why the hedging argument is unavailable to the plaintiff: First, not once during the trial did he testify or claim that he was hedging. Second, the existence of a hedge presupposes the ownership of actual grain. A sale of corn futures cannot be a hedge unless the seller owns an equal amount of actual grain. It is in evidence in this case that the petitioner owned no corn during the time of these trades (Rec. 167). It is in evidence that petitioner was long September corn in an amount equal to his short position in July corn. He was clearly not hedging but gambling on the relationship between the July and September futures markets.

III.

PETITIONER'S CASES DISTINGUISHED.

The petitioner has cited a number of cases not decided by Illinois courts which he contends construe the Illinois statute. Many of those cases do not even involve transactions on the Chicago Board of Trade. Petitioner relies primarily upon *Board of Trade* v. *Christie G. & S. Co.* (1905) 198 U. S. 246. In that case it was contended that the Chicago Board of Trade was itself a bucket-shop. In upholding the validity of the Chicago Board of Trade as an institution, Mr. Justice Holmes, speaking for this Court, said at page 251:

> "We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss."

The transactions in this suit, however, do not involve contracts between the members of the Exchange in the pit. The dissimilarity of the contract between a customer and his broker, and a contract between two members of the Exchange was pointed out in *Dickson* v. *Uhlmann Grain Co.*

(1933) 288 U. S. 188, where this court, speaking through Mr. Justice Brandeis, said at page 193:

> "But there were two distinct agreements: that between customer and company, in which both parties acted as principals; and that between the company and brokers on the exchange, in which both of the parties there likewise acted as principals. *It does not follow that because the contracts between the members of the exchanges were valid those entered into by the company at Carrollton with Dickson and its other customers were valid also.*" (Italics supplied.)

Conclusion.

Petitioner, the plaintiff below, received a directed verdict on one of the issues and now complains because the court did not direct a verdict in his favor on the only other issue involved. It is respectfully submitted that the Illinois statute has been repeatedly construed by the Illinois courts as making illegal grain futures trades where the parties intend to settle on differences and not by delivery. The issue of intention was one of fact which the trial court properly submitted to the jury. This case depends on its own facts and no important question of local law is involved. We therefore ask that the petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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